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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 126

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

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UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

Petitioner, MISSOURI PACIFIC RAILROAD COMPANY, prays that a Writ of Certiorari, issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on January 14, 1958.

Citations to Opinion Below

The opinion of the Court of Appeals (R. 32), printed in Appendix "A" hereto, P. 11, is not officially reported but is printed in 250 Federal Reporter 2nd Series at Page 805. The Court of Appeals wrote no opinion in denying Petitioner's Petition for Rehearing and Second Petition for Rehearing.

Jurisdiction

The Judgment of the Court of Appeals was entered on January 14, 1958 (R. 39). A timely Petition for Rehearing, filed on February 1, 1958, was denied March 12, 1958 (R. 44). Leave to Petitioner to file a Second Petition for Rehearing was granted (R. 62) and such Petition was filed March 21, 1958, and was denied by the Court on May 22, 1958. Jurisdiction of this Court is invoked under 28 *U.S.C.*, Section 1254. The Court of Appeals decided questions of substance probably not in accord with the applicable decisions of this Court.

Questions Presented

1. Whether under the doctrine of Primary Jurisdiction the issue as to rate applicable on the Shipments of Air Force Organization Equipment involved herein should have been referred to the Interstate Commerce Commission. *United States of America v. Western Pacific Railroad Company*, 352 U.S. 59, 77 S. Ct. 161.

2. Whether the set-off plead by Respondent to a portion of Petitioner's complaint was barred by virtue of the limitation provision in the Commodity Credit Corporation Charter Act of 1948, 15 *U.S.C.* 714b (c), where the cause of action asserted in the set-off arose more than ten years before such set-off was exercised.

Statutes Involved

The Statutory provisions involved are 5 *U.S.C.* Sec. 1001 (A), 5 *U.S.C.* Sec. 1004(d) and the Commodity Credit Corporation Charter Act, 15 *U.S.C.* Sec. 714b(c), (g), (h), and (k). They are printed in Appendix "B". infra, pp. 18-22.

Statement

The two questions arise out of unrelated occurrences. The facts with reference to the first question are as follows:

The Respondent delivered to Petitioner, a common carrier, nine carloads of air force organization shipping cases to be transported from St. Louis, Missouri to Houston, Texas. Each case consisted of four nested containers made of 3/8" plywood, the inside and outside of each container being covered with .018 inch vulcanized fibre glued to the plywood with a water resistant glue. The Petitioner attempted to collect charges on the basis that these items were covered by the tariff covering "baskets (boxes) or Hampers: chemically hardened fibre." The Respondent contended that these items were within the tariff covering "boxes, wooden, NOIBN." NOIBN means otherwise indexed by name in the classification (R. 16 and 17). The District Court sustained Petitioner's contention (R. 24) and the Court of Appeals sustained Respondent's contention (R. 39). The Petitioner, by second Petition for Rehearing, requested the Court of Appeals to remand the case so that Petitioner might submit the issue to the Interstate Commerce Commission.

The facts with reference to the second question are as follows:

During 1943 and prior thereto the commodity credit corporation delivered to Petitioner for transportation several freight cars containing food (R. 24). The Petitioner performed the transportation services and billed Respondent for what it contended to be the applicable charges. These bills were paid and subsequently Respondent deducted, from Bills presented by Petitioner for Shipments which moved in 1953, certain sums of money, alleging that

it had overpaid Petitioner on the 1943 shipments. Petitioner contended that this set off was barred by Section 4c of the Commodity Credit Corporation Charter Act of 1948, 15 *U.S.C.* Sec. 714b(c). The District Court sustained Petitioner's position and the Court of Appeals reversed the District Court on this point.

The District Court had jurisdiction of this cause under 28 *U.S.C.* Sec. 1346(2), since the action is a suit against the United States upon a claim not exceeding $10,000.00.

Reasons for Granting the Writ

A. With reference to the First Point.

The decision of the Court of Appeals on this point is directly contra to the decision of this Court in the case of the *United States of America v. Western Pacific Railroad Company*, 352 U.S. 59, 77 S. Ct. 16, and the decision of Court of Appeals in the cases of *Northwestern Auto Parts Company v. Chicago, Burlington & Quincy Railroad Company, et al.*, 240 Fed. 2d 743 and *Northern Pacific Railway Company v. United States*, 213 F. 2d 366.

In the *Western Pacific Case, Supra*, this Court had under consideration the matter of which tariff should apply to a shipment of aerial bomb cases filled with napalm gel. The carrier in that case contended that the Commodity should be classed as "incendiary bombs", even though the burster and bomb fuse had not been added, while the government contended that the commodity should be carried at the combination rate applicable to the components of the aerial bomb cases.

We quote from the opinion of this Court in the *Western Pacific Case* from P. 166 of 77 S. Ct. as follows:

"Thus the first question presented is whether effectuation of the statutory purposes of the Interstate Commerce Act requires that the Interstate Commerce Commission should first pass on the construction of the tariff in dispute here; this, in turn, depends on whether the question raises issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by that Act. Decision is governed by two earlier cases in this Court. In Texas & Pacific R. Co. vs. American Tie & Timber Co. 234 U.S. 138, 34 S. Ct. 885, 58 L. Ed. 1255, a shipper attempted to ship oak railroad ties under a tariff for 'lumber'. The carrier rejected them, urging that such ties were not lumber. In a damage action expert testimony was received on the question. This Court, however, held that the Interstate Commerce Commission alone could resolve the question. The effect of the holding is clear; the Courts must not only refrain from making tariffs, but, under certain circumstances, must decline to construe them as well."

This Court further points out that the question of whether steel casings filled with napalm gel are incendiary bombs within the context of the tariff is more than simply a question of reading the tariff language or applying abstract rules of construction. The basic issue is how far the reasons justifying a high rate for the carriage of extra-hazardous objects are applicable to the shipment in question. That is the issue involved in this case. The basic issue, in the instant case, is how far the reasons justifying a higher rate for the carriage of chemically hardened fibre cases are applicable to the shipments in question. Certainly there are commercial reasons justifying a higher rate on chemically hardened fibre cases than on wooden boxes.

The holding of the Court of Appeals in the *Northwestern Auto Parts Company Case, Supra,* followed the holding of this Court in the *Western Pacific Case.* We quote from the opinion of that case as follows (P. 740 of 240 F. 2d):

> "The problem of deciding in a case whether plaintiff's shipments were 'scrap iron or steel having value for remelting purposes only' involves many of the considerations expressed by the Supreme Court in regard to the problem in the Western Pacific case. The record here gives us no inkling of the factors that produce the scrap iron rates or the rate on 'automotive engine parts other than automobile bodies, old, used, having value for reconditioning,' or what it is that justifies the difference between the rates. All that the Supreme Court said in the Western Pacific case (77 S. Ct. 165) as to the necessity for 'expert and specialized knowledge' in that case is applicable here, and it must be held here in accord with the teaching of the Western Pacific case, that the question of the tariff construction, as well as that of the reasonableness of the tariff as applied, are within the exclusive primary jurisdiction of the Interstate Commerce Commission."

Respondent will no doubt contend here, as it did in the Court of Appeals, that Petitioner did not raise this point timely. In answer to that contention we urge upon the Court the fact that the point was not raised by either party in this Court in the *Western Pacific Case.* Certainly the raising of this point by Petitioner in the Court of Appeals was more timely than was the action of either party in the *Western Pacific Case.* We also urge upon this Court the holding of the Court of Appeals in the case of *Northern Pacific Railway Company v. United States,* 213

F. 2d 366. The Court of Appeals, in that case, held that this point is jurisdictional and hence could be raised for the first time in the Appellate Court.

B. With reference to the Second Question.

Since the transportation services on which Respondent contends it was overcharged were performed for the Commodity Credit Corporation in 1943 and prior thereto and the set-off made by Respondent was made from bills submitted by Petitioner for services rendered in 1953 (R. 24), a period of ten years elapsed between the alleged overcharge and the set-off by the Respondent.

The pertinent part of the statute 15 *U.S.C.*, Sec. 714b(c) is as follows:

> ". . . No suit by or against the Corporation shall be allowed unless (1) it shall have been brought within six years after the right accrued on which suit is brought, . . . The Defendant in any suit by or against the Corporation may plead, by way of setoff or counterclaim, any cause of action, whether arising out of the same transaction or not, which would otherwise be barred by such limitation if the claim upon which the Defendant's cause of action is based had not been barred prior to the date that the Plaintiff's cause of action arose . . . Any suit by or against the United States as the real party in interest based upon any claim by or against the Corporation shall be subject to the provisions of Subsection (c) of this section to the same extent as though suit were by or against the Corporation . . ."

The wording of the Act, quoted above, is plain. Congress did not overlook the matter of administrative settlements. It specifically provided for setoffs and counterclaims in the statute. The Respondent and the court of

claims in *Union Pac. R. Co. v. U. S.*, 147 F. Supp. 483, do not give proper consideration to that portion of the statute which reads as follows:

> "The Defendant in any suit by or against the Corporation may plead, by way of setoff or counterclaim, any cause of action . . ., which would otherwise be barred by such limitation if the claim upon which the Defendant's cause of action is based had not been barred prior to the date Plaintiff's cause of action arose."

By enactment of the above sentence, Congress has stated what setoffs and counterclaims may be pled in a suit against the Corporation. Such provision certainly eliminates the pleading of any other setoffs or counterclaims. The court of claims erred when it stated that:

> "Congress did not, by Section 4(c), mean more than it said, which was that no suit could be brought upon claims more than six years old." (Appellant's brief P. 41).

Congress said more than that. It said further that setoffs or counterclaims could be pled *if they were not barred when the Plaintiff's cause of action arose.* Certainly when Congress lays down a specific condition which must be met before a setoff or counterclaim can be asserted, it meant that such setoffs and counterclaims which did not meet that condition could not be asserted. Under Appellant's construction and under the interpretation given the statute by the court of claims, there was no need for the saving provision enacted by Congress. Congress expected all setoffs to be barred by the limitation provision and evidently thought it necessary to insert the one saving provision.

The supposedly inequitable features noted by the court of claims are not in fact so inequitable. While we submit the equities of the matter should be passed upon by Congress rather than the courts, *United States v. Lindsay*, 346 U.S. 568, 98 L. Ed. 300, 74 S. Ct. 287, we respectfully submit that it certainly places no undue burden upon the Government to require it to audit its claims during a six-year period. Indeed, no reason appears why the Commodity Credit Corporation claims cannot be given preference, if such be necessary to receive an audit within six years.

Congress, in other sections, 15 *U.S.C., Section* 714b(g) and (h), has given the Corporation the power to enter into the usual business contracts in order to carry out its purpose. No doubt, Congress thought that since the Corporation was going to be engaged in the usual business transactions, it should be subject to some of the requirements to which other corporations are subject. No good reason appears why it should not be so subjected.

The argument of the Court of Claims in the *Union Pacific Supra,* is not a valid one. Congress in Sec. 4c was not dealing with the problem of administrative settlement of claims. It was speaking of a set-off or counterclaim. (And it is a set-off as counterclaim which the government is contending for in this situation (R. pps. 10-11)). No doubt the Government in considering claims against it which are barred from suit because of limitation does take into consideration, in making its administrative settlements, claims which the Commodity Credit Corporation has against the same person which are also barred from suit by limitation. But that isn't the situation present in this case. In this situation there is no contention that Petitioner's Claim is barred by limitation. Under the express

wording of Sec. 4C, quoted above, the only set-off or counterclaims which can be asserted against this Claim are those which were not barred at the time Petitioner's cause of action arose. The Respondent's counterclaim was barred at that time and hence it can not be asserted in this action.

The act upon which Appellant relies is a general statute passed in 1940. It will be noted that the statute makes no mention of services rendered to Corporations whose stock is owned by the Government. Contrast this general statute with the specific statute upon which Appellee relies. This statute was passed in 1949, nine years subsequent to the enactment of the general statute. It is axiomatic that a specific statute will control over a general statute. Especially is this true when the specific statute was enacted subsequent to the enactment of the general statute.

Conclusion

The judgment of the Court of Appeals is erroneous. It is directly contra to the holding of this Court in the *Western Pacific Case* and the Court of Appeals in the *Northwestern Auto Parts Company* and *Northern Pacific Railway Company*, cases with reference to the submitting to the Interstate Commerce Commission the question of which tariff covers the item in question. On the limitation issue the judgment of the Court is directly contra to the plain express provisions of the act. For these reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16777

UNITED STATES OF AMERICA, *Appellant*,

VERSUS

MISSOURI PACIFIC RAILROAD COMPANY, *Appellee*

Appeal from the United States District Court for the Southern District of Texas

---

(January 14, 1958)

Before HUTCHESON, Chief Judge, and RIVES and JONES, Circuit Judges

HUTCHESON, Chief Judge: This suit arises out of the action of the government in deducting, under the authority of Sec. 322 of the Transportation Act of September 18, 1940, 49 U.S.C. 66, from freight bills admittedly due, sums which it claimed as overpayments on other freight bills earlier paid.

Submitted on a stipulation of facts and decided by the district judge in favor of the plaintiff railroad, three questions are presented.

The first question is: Was the railroad, which sued for the admitted freight due it on later shipments, entitled to recover from the government the amount deducted by it in a later audit on the claim that, while the shipment was first billed to it as weighing 9290 pounds, a correction bill was later sent and it was paid for as weighing over 35,000 pounds? The primary point here, since no proof was offered as to the correct weight, is whether the plaintiff railroad company had the burden of proving that the government's deduction, based upon its assertion that the shipment weighed 9290 instead of the 35,000 pounds it paid for, was wrong, or whether the burden was upon the defendant to prove the correct weight.

The district judge found with the plaintiff that the burden was on the government, and, in addition, without any evidence to support the finding, since the correct weight was not testified to and the only part of the stipulation having any bearing on the question was that two bills of lading, the first stating the weight as 9290 and the second one stating it as over 35,000, were issued by the railroad, he categorically found that the weight was 35,300 pounds.

The second question is whether, as the plaintiff claims, shipments of Air Force cases shipped from St. Louis to Houston, of nine carloads of a commodity described on each of the bills of lading as "Item No. 1, Case, Shipping. Air Force Organization Equipment (Shipping boxes, wooden, chemically hardened fibre boxes)", were properly

charged the rates provided for in Consolidated Freight Classification No. 15 "Baskets (boxes) or hampers chemically hardened fibre", or whether, as the defendant claims, the articles are ratable and were properly charged as within exceptions to the classification in S.W. Lines Tariff 173 Q ICC No. 3584, under the description "Boxes, wooden noibn", "noibn" meaning not otherwise indexed by name in the classification.

It was stipulated that each case consisted of four nested containers made of 3/8 inch plywood. The inside and outside of each container was covered with .018 vulcanized fibre glued to the plywood with a water resistant glue. It was further stipulated that if the plaintiff's contention is correct, the plaintiff is due judgment for $2,487.57 on the item in this paragraph, and that if the defendant's contention is correct, the plaintiff is due nothing on this item.

The district judge found with the plaintiff railway company.

The third question is whether, because the withholding action was taken after the running of the period set forth in Section Four of the Commodity Credit Corporation Charter, Act of June 29, 1948, as amended, 15 U. S. C. Sec. 714(c), the United States was without authority to deduct freight charges paid from funds of the Commodity Credit Corporation on shipments made from Beaumont, Texas, for export for its account. The government contends that the statute did not come into play and was not effective because the deduction was merely an administrative act under the lawful exercise of the authority granted in Sec. 322.

The district judge held with plaintiff that the Statute barred the deduction.

As to its first claim, the government is here pointing out that, though the decision of the district judge is supported by *United States v. New York, New Haven & Hartford*, 236 F(2) 201 (1st Cir.), a writ of certiorari has been granted in it, and arguing with what has turned out to be prophetic vision[1] that the decision will be reversed and the position of the United States sustained.

As a matter of original viewpoint, as well as on the authority of *United States v. New York, New Haven and Hartford Ry. Co.*, note 1, *supra*, we find ourselves in agreement with the government's position.

When it comes to the second question, the tariff to be applied to the shipment of Air Force Organization equipment, we think the rule which should govern such construction is no better stated than in *United States v. Missouri, Kansas & Texas Railroad Co.*, 194 F(2) 777, at pages 778-9:

> "The construction of a printed railroad tariff presents a question of law and does not differ in character from that presented when the construction of any other document is in dispute. The four corners of the instrument must be visualized and all the pertinent provisions considered together, giving effect so far as possible to every word, clause, and sentence therein contained. The construction should be that meaning which the words used might reasonably carry to the shippers to whom they are addressed, and any ambiguity or

[1] United States of America, petitioner, v. New York, New Haven and Hartford Ry. Co. . . U.S. . . . (12-16-57).

> reasonable doubt as to their meaning must be resolved against the carriers. But claimed ambiguities or doubts as to the meaning of a rate tariff must have a substantial basis in the light of the ordinary meaning of the words used and not a mere arguable basis. Hohenberg v. Louisville & N. R.R. Co., 5 Cir., 46 F(2) 952; Christensen v. Northern Pac. Ry. Co. 8 Cir. 184 F(2) 534; Norvell-Wilder Supply Co. v. Beaumont, Sour Lake & Western Railway Co., 274 ICC 547."

Applying that rule to the tariffs in question here, we agree with the position of the government that the district judge wrongly construed them and the wrong rate was applied. In reaching this conclusion, we primarily put it on the ground that the tariffs under construction on their face admit of no other reasonable conclusion. But, if we are wrong in this, we think the same result is required in the application of the principle thus stated in the above question: "The construction should be that meaning which the words used might reasonably carry to the shippers to whom they are addressed, and any ambiguity or reasonable doubt as to their meaning must be resolved against the carriers." Other statements and applications of this rule are to be found in *Hohenberg v. Louisville & N. RR. Co., supra*, at page 955, *Am. Ry. v. Price*, 54 F(2) 67, and *Atlantic Coast Railway v. Atlantic Bridge Co.*, 57 F(2) 654. In the *Hohenberg* case, at page 955, the court said:

> "Where there is no ambiguity in the language used, a rate may be unjust and yet be enforced as the established one, but in doubtful cases, in the construction of a tariff, as of a law, in order to arrive at the intent of its framers, a court is

> warranted in considering how the rates claimed would operate as a matter of justice."

while in the *Atlantic Coast Line* case, the principle was thus stated:

> "Tariffs, like statutes, have the force of law; like statutes they must be expressed in clear and plain terms, so that those dealing with and governed by them may understand them and act advisedly * * * If they are ambiguous or permit of two meanings, the shipper may construe them in the most favorable way to himself which the terms permit."

Of the third point, that it was error to hold that the recovery of the alleged overpayment made by the Commodity Credit Corporation on appellee's bills was barred by Section 4(c) of the Commodity Credit Corporation Charter Act of 1948, it is sufficient to say that we agree with the position of the United States that the precise question here involved was correctly decided by the Court of Claims adversely to the carrier in *Union Pacific R.R. Co. v. United States*, 147 F. Supp. 483, and, without laboring the matter further, we hold that upon the considerations and for the reasons stated in that opinion, the finding and conclusion of the district judge was wrong.

The judgment appealed from is, therefore, REVERSED and the cause is REMANDED with directions (1) to deny appellee recovery of the deductions arising out of its charges for the transportation of the airplane fusilages and Air Force boxes, and (2) to put appellee to its proof on the question of the correctness of its charges for the

transportation of the Commodity Credit Corporation foodstuffs. REVERSED and REMANDED.

A true copy
Test:

EDWARD W. WADSWORTH
Edward W. Wadsworth
Clerk, U. S. Court of Appeals, Fifth Circuit, New Orleans, Louisiana

(Seal)

JUDGMENT

Extract from the Minutes of January 14, 1958.

UNITED STATES OF AMERICA
versus
MISSOURI PACIFIC RAILROAD COMPANY

No. 16777

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions (1) to deny appellee recovery of the deductions arising out of its charges for the transportation of the airplane fusilages and Air Force boxes, and (2) to put appellee to its proof on the question of the correctness of its charges for the transportation of the Commodity Credit Corporation foodstuffs.

APPENDIX "B"

Administrative Procedure Act - 5 U.S.C. Sections 1001 (a) and 1004 (d):

"Section 1001(a) - "Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this chapter shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of Section 1002 of this title, there shall be excluded from the operation of this chapter (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by sections 301-303, 304, 305, 306-309, 310, 311-318, 1881-1884 and 1891-1902 of Appendix to Title 50, and sections 739 and 1744 of Title 12; sections 1611-1614, 1615-1646, and 981-985 of Appendix to Title 50, and sections 101-125 of Title 41; and sections 1738, 1739, and 1743 of Title 12, and sections 1821-1833 of Appendix to Title 50."

"Section 1004(d) - The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty. June 11, 1946, c. 324, p. 5, 60 Stat. 239."

Commodity Credit Corporation Charter Act 15 U.S.C. Sections 714(b), (c), (g), (h), and (k):

"Section 714 b (c) - May sue and be sued, but no attachment, injunction, garnishment, or other similar process, mesne of final, shall be issued against the Corporation or its property. The district courts of the United States, including the district courts of any Territory or possession, shall have exclusive original jurisdiction, without regard to the amount in the controversy, of all suits brought by or against the Corporation: PROVIDED, That the Corporation may intervene in any court in any suit, action, or proceedings in which it has an interest. Any suit against the Corporation shall be brought in the District of Columbia, or in the district wherein the plaintiff resides or is engaged in business. No suit by or against the Corporation shall be allowed unless (1) it shall have been brought within six years after the right accrued on which suit is brought, or (2) in the event that the person bringing such suit shall have been under legal disability or beyond the seas at the time the right accrued, the suit shall have been brought within three years after the disability shall have ceased or within six years after the right accrued on which suit is brought, whichever period is longer. The defendant in any suit by or against the corporation may plead, by way of set-off or counterclaim any cause of action, whether arising out of the same transaction or not, which would otherwise be barred by such limitation if the claim upon which the defendant's cause of action is based had not been barred prior to the date that the plaintiff's cause of action arose: PROVIDED, That the defendant shall not be awarded a judgment on any such set-off or counterclaim for any amount in excess of the amount of the plaintiff's claim established in the suit. All suits against the cor-

poration shall be tried by the Court without a jury. Notwithstanding any other provision of sections 714-714o of this title, the Federal Tort Claims Act shall be applicable to the Corporation. Any suit by or against the United States as the real party in interest based upon any claim by or against the Corporation shall be subject to the provisions of the subsection (c) of this section to the same extent as though such suit were by or against the corporation, except that (1) any such suit against the United States based upon any claim of the type enumerated in section 1491 of Title 28, may be brought in the United States Court of Claims, and (2) no such suit against the United States may be brought in a district court unless such suit might, without regard to the provisions of sections 714-714o of this title, be brought in such court."

"Section 714 b (g) - May enter into and carry out such contracts or agreements as are necessary in the conduct of its business. State and local regulatory laws or rules shall not be applicable with respect to contracts or agreements of the corporation or the parties thereto to the extent that such contracts or agreements provide that such laws or rules are inconsistent with such contracts or agreements."

"Section 714 b (h) - May contract for the use, in accordance with the usual customs or trade and commerce, of plants and facilities for the physical handling, storage, processing, servicing, and transportation of the agricultural commodities subject to its control. The Corporation shall have power to acquire personal property necessary to the conduct of its business but shall not have power to acquire real property or any interest therein except that it may (a) rent or lease office space necessary for the conduct of its business and (b) acquire real property or any interest therein

for the purpose of providing storage adequate to carry out effectively and efficiently any of the corporation's programs, or of securing or discharging obligations owing to the corporation, or of otherwise protecting the financial interests of the corporation: PROVIDED, That the authority contained in this subsection shall not be utilized by the Corporation for the purpose of acquiring real property, or any interest therein, in order to provide storage facilities for any commodity unless the Corporation determines that existing privately owned storage facilities for such commodity in the area concerned are not adequate: PROVIDED FURTHER, That no refrigerated cold storage facilities shall be constructed or purchased except with funds specifically provided by Congress for that purpose: AND PROVIDED FURTHER, That nothing contained in this subsection shall limit the duty of the Corporation, to the maximum extent practicable consistent with the fulfillment of the Corporation's purposes and the effective and efficient conduct of its business, to utilize the usual and customary channels, facilities, and arrangements of trade and commerce in the warehousing of commodities: AND PROVIDED FURTHER, That to encourage the storage of grain on farms, where it can be stored at the lowest cost, the Corporation make loans to grain growers needing storage facilities when such growers shall apply to the Corporation for financing the construction or purchase of suitable storage, and these loans shall be deducted from the proceeds of price support loans or purchase agreements made between the Corporation and the growers. Notwithstanding any other provision of law, the Commodity Credit Corporation is authorized, upon terms and conditions prescribed or approved by the Secretary of Agriculture, to accept strategic and critical materials produced abroad in exchange for agricultural commodities acquired by

the Corporation. Insofar as practicable, in effecting such exchange of goods, normal commercial easily storable and those which serve as prime incentive goods to stimulate production of critical and strategic materials. The determination of the quantities and qualities of such materials which are desirable for stock piling and the determination of which materials are strategic and critical shall be made in the manner prescribed by section 98 a of Title 50. Strategic and critical materials acquired by Commodity Credit Corporation in exchange for agricultural commodities shall, to the extent approved by the Munitions Board of the National Military Establishment, be transferred to the stock pile provided for by the Strategic and Critical Materials Stock Piling Act; and when transferred to the stock pile the Commodity Credit Corporation shall be reimbursed for the strategic and critical materials so transferred to the stock pile from the funds made available for the purpose of the Strategic and Critical Materials Stock Piling Act, in an amount equal to the fair market value, as determined by the Secretary of the Treasury of the material transferred to the stock pile. Nothing contained herein shall limit the authority of the Commodity Credit Corporation to acquire, hold, or dispose of such quantity of strategic and critical materials as it deems advisable in carrying out its functions and protecting its assets."

"Section 714 b (k) - Shall have authority to make final and conclusive settlement and adjustment of any claims by or against the Corporation or the accounts of its fiscal officers."

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In the Supreme Court of the United States

October Term, 1958

No. 126

MISSOURI PACIFIC RAILROAD COMPANY, PETITIONER

v.

THE UNITED STATES

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the Southern District of Texas (R. 22-25) are not reported. The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. A) is reported at 250 F. 2d 805.

JURISDICTION

The judgment of the Court of Appeals was entered on January 14, 1958 (R. 39). A timely petition for rehearing was denied on March 12, 1958 (R. 44).

Leave to file a second petition for rehearing was granted on March 27, 1958 (R. 62). The second petition for rehearing was denied on May 22, 1958 (R. 79). The petition for a writ of certiorari was filed on June 25, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that the administrative deduction, authorized by Section 322 of the Transportation Act of 1940, 49 U.S.C. 66, of the overpayments made by Commodity Credit Corporation with regard to transportation services performed for Commodity by petitioner was not time-barred by Section 4(c) of the Commodity Credit Corporation Charter Act of 1948, 15 U.S.C. 714b(c).

2. Whether the Court of Appeals properly rejected petitioner's claim, raised for the first time in the litigation on its second petition for rehearing in the Court of Appeals, that a tariff classification question with regard to a shipment of Air Force boxes should have been referred to the Interstate Commerce Commission under the doctrine of "primary jurisdiction".

STATUTES INVOLVED

Section 322 of the Transportation Act of September 18, 1940, 54 Stat. 955, 49 U.S.C. 66, provides as follows:

> Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of

1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

Section 4 of the Commodity Credit Corporation Charter Act of June 29, 1948, 62 Stat. 1070, as amended, 15 U.S.C. 714b, provides in relevant part as follows:

The Corporation—

* * * *

(c) May sue and be sued, but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Corporation or its property. * * * No suit by or against the Corporation shall be allowed unless (1) it shall have been brought within six years after the right accrued on which suit is brought, * * *. The defendant in any suit by or against the Corporation may plead, by way of set-off or counterclaim, any cause of action, whether arising out of the same transaction or not, which would otherwise be barred by such limitation if the claim upon which the defendant's cause of action is based had not been barred prior to the date that the plaintiff's cause of action arose: *Provided*, That the defendant shall not be awarded a judgment on any such set-off or counterclaim for any amount in excess of the amount of the plaintiff's claim established in the suit. * * * Any suit by or against the United States as the real party in interest based upon

any claim by or against the Corporation shall be subject to the provisions of subsection (c) of this section to the same extent as though such suit were by or against the Corporation, except that (1) any such suit against the United States based upon any claim of the type enumerated in section 1491 of Title 28, may be brought in the United States Court of Claims, * * *.

* * * *

(k) Shall have authority to make final and conclusive settlement and adjustment of any claims by or against the Corporation or the accounts of its fiscal officers.

* * * *

STATEMENT

This action was instituted by petitioner, Missouri Pacific Railroad Company,[1] under the Tucker Act, 24 Stat. 505, as amended, 28 U.S.C. 1346(a)(2), to recover certain amounts which had been deducted in the payment of bills rendered by petitioner in connection with transportation services performed for the Government in 1953 (R. 3-6). These deductions had been made pursuant to the provisions of Section 322 of the Transportation Act of 1940, *supra*, pp. 2-3, and had stemmed from a determination by the Comptroller General that petitioner had overcharged the Government on certain earlier shipments, the bills for

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[1] The action was actually commenced by Guy A. Thompson, Trustee of the Beaumont, Sour Lake and Western Railway Co. (R. 3). On March 1, 1956, the trusteeship was terminated and all of its assets and liabilities were transferred to petitioner (R. 13). On February 6, 1957, petitioner was substituted as party-plaintiff (R. 27).

which had been paid upon presentation without prior audit (R. 7-12). The case was submitted to the district court on stipulated facts (R. 13-21). Judgment for petitioner in the district court (R. 28-29) was reversed on appeal by the Court of Appeals (Pet. App. A; 250 F. 2d 805).

Petitioner's contentions here are limited to only two of the three series of shipments in dispute below. The pertinent facts concerning them may be summarized as follows:

1. *Transportation of foodstuffs for Commodity Credit Corporation.* The Commodity Credit Corporation shipped foodstuffs from various points of origin to Beaumont, Texas, for export (R. 18). The bills were paid upon presentation from funds of Commodity Credit Corporation (R. 18). More than six years later, following a determination of overpayment by the General Accounting Office, the deductions authorized by Section 322 were made from 1953 bills submitted by petitioner (R. 18).

Petitioner contended in the district court that it had not overcharged the Government (R. 18). It further argued that, in any event, the deduction of the alleged overpayment more than six years after its original bills had been paid was precluded by Section 4(c) of the Commodity Credit Corporation Charter Act of 1948, as amended, 15 U.S.C. 714b(c), *supra*, pp. 3-4 (R. 18). The district court agreed with the latter contention, and, therefore, did not pass upon the merits of the deduction (R. 25).

In reversing, the Court of Appeals stated that it

was in complete agreement with the decision of the United States Court of Claims in *Union Pacific Railroad Co.* v. *United States*, 147 F. Supp. 483, certiorari denied, 353 U.S. 950, involving precisely the same question. The Court of Appeals, in adopting the reasoning of the *Union Pacific* decision, ruled in effect that the limitation provisions of Section 4(c) did not encompass the administrative settlement procedure established under Section 322 of the Transportation Act of 1940.

2. *Transportation of Air Force Boxes.* The Government shipped from St. Louis to Houston nine carloads of its property described in the bills of lading as "Item No. 1, Case, Shipping. Air Force Organization Equipment (Shipping boxes, wooden, Chemically hardened fibre boxes)" (R. 16). Each case consisted of four nested containers made of 3/8-inch plywood (R. 16-17). The inside and outside of each container was covered with .018-inch vulcanized fibre attached to the plywood with a water-resistant glue (R. 17).

Petitioner computed its charges and was paid upon the presentation of its bill, on the basis of the applicability of the description "baskets (Boxes) or Hampers: Chemically hardened fibre" contained in Consolidated Freight Classification No. 15 (R. 17). On the post-audit, the General Accounting Office determined that the articles were ratable in exceptions to the classification in Southwestern Lines Tariff No. 173-Q, I.C.C. No. 3584, under the description "Boxes, wooden, noibn" (R. 17).[2] On the basis of that de-

[2] The term "noibn" means "not otherwise indexed by name in the classification" (R. 17).

termination, the General Accounting Office concluded that the Government had been overcharged and, accordingly, made deductions under Section 322 from petitioner's 1953 bills (R. 16, 17).

The district court found that the shipping cases were "identical in all material characteristics with boxes made entirely of chemically hardened fibre" (R. 23) and thus concluded that they came within Consolidated Freight Classification No. 15 (R. 24). On appeal, the Court of Appeals reversed. Pointing to the principle of tariff construction that a tariff is to be given that meaning which its terms would reasonably convey to the shipper, and that any ambiguity in meaning must be resolved against the carriers, the court held that the boxes involved were ratable as wooden boxes, not otherwise indexed by name, since the tariffs under construction "on their face admit of no other reasonable conclusion" (Pet. App. A, p. 15).

Subsequently, petitioner filed two petitions for rehearing in the Court of Appeals (Pet. 3). The first, which was denied without opinion on March 12, 1958, challenged, *inter alia*, the holding of the court with regard to classification of these boxes. The second petition, filed on March 21, 1958, raised for the first time in the entire litigation the contention that the tariff classification question should have been referred to the Interstate Commerce Commission under the doctrine of "primary jurisdiction". On May 22, 1958, this petition was also denied without opinion.

ARGUMENT

1. The Court of Appeals correctly held that the limitation provisions of Section 4(c) of the Commodity Credit Corporation Charter Act, *supra*, pp. 3-4, are not applicable to administrative deductions made under Section 322 of the Transportation Act of 1940, *supra*, pp. 2-3. Petitioner's argument here is primarily an attack on the decision of the Court of Claims in *Union Pacific Railroad Co.* v. *United States*, 147 F. Supp. 483, certiorari denied, 353 U.S. 950, which resolved the same question in the Government's favor and with which the court below was in complete agreement. The contentions made by petitioner here are essentially the same as those raised in the unsuccessful attempt to obtain review by this Court in *Union Pacific* and are equally lacking in merit.[3]

(a) As this Court has observed, Section 322 was designed, on the one hand, to give the carrier the benefit of immediate payment, and, on the other, to enable the Government to put itself in *statu quo ante* with respect to those matters as to which subsequent audit showed error or probability of error. See *United States* v. *N.Y., N.H. & H.R. Co.*, 355 U.S. 253, 260; cf. *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 74. This desire to insure that the prompt payment of transportation bills would not have a prejudicial effect upon the public treasury sufficiently explains, we think, the absence of a limitations period provision in Section 322. As the Court

[3] See the petition for a writ of certiorari and the brief in opposition in No. 859, Oct. T., 1956, *Union Pacific Railroad Co.* v. *United States.*

of Claims observed in *Union Pacific*, were administrative recoupment barred unless effectuated during the period for which petitioner here contends, the Government would be unable to protect itself against the retention by the carrier of excessive and unlawful charges.

(b) Petitioner urges, however, that, even though there is no limitation upon administrative recoupment of overcharges under Section 322, Section 4(c) of the Commodity Credit Corporation Charter Act, *supra*, pp. 3-4, imposes a six-year time limit upon such recoupment where the transportation services had been performed for Commodity. No explanation is offered, however, as to how a limitation provision which refers solely to the institution of *suits* by or against Commodity can be read as encompassing administrative settlements as well. Such an extension of a limitations provision beyond the statutory terms is foreclosed not only by this Court's decision in *Du Pont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462, but also by Section 4(k) of the Charter Act. This section, conferring authority on Commodity to settle any claims by or against it, like Section 322 of the Transportation Act, contains no time limitation.

Nor is petitioner's cause advanced by its reliance upon the provision in Section 4(c) authorizing the assertion, by way of set off or counterclaim, of causes of action which had not become time-barred prior to the date that the plaintiff's cause of action arose. This provision neither purports to have, nor does have, any bearing upon administrative settlements undertaken under Section 322 of the Transportation

Act or Section 4(k) of the Charter Act. Rather, as is true of the balance of Section 4(c), it relates only to the circumstances in which judicial enforcement of a cause of action may be obtained. The Government is, of course, not seeking in this litigation to enforce any claim against petitioner. Instead, like the carrier in *Union Pacific*, petitioner is asserting a purported cause of action arising out of the Section 322 deduction made from its 1953 bills.

2. With respect to the refusal of the Court of Appeals to refer the question of the correct tariff classification of the Air Force boxes to the Interstate Commerce Commission, petitioner urges the existence of a conflict with the decision of this Court in *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59. It is doubtful that this contention is open to petitioner. Its request for referral was made for the first time on its second petition for rehearing in the Court of Appeals. Until that advanced point in the litigation, petitioner, in agreement with the Government, had urged the district court and the Court of Appeals that the tariff classification question presented was one singularly appropriate to judicial interpretation in the first instance. Petitioner's belated effort to undo the decision of the court below by reversing positions on the "primary jurisdiction" question was clearly subject to denial as untimely. In any event, the decision below was manifestly correct on the merits and in accord, rather than in conflict, with the principles reiterated by this Court in *Western Pacific*.

(a) Prior to the filing of its second petition for rehearing in the Court of Appeals, petitioner had con-

sistently urged that the question concerning tariff classification of the Air Force boxes was one appropriate for judicial interpretation. In the stipulation before the district court (R. 13-20), there was not the least suggestion of facts that would render reference to the Interstate Commerce Commission either desirable or necessary. On the appeal from the determination of that court in petitioner's favor, both parties again regarded the issue as being wholly appropriate for judicial resolution. And finally, in its first petition for rehearing, following the reversal, petitioner once again did not question the propriety of judicial action, but, to the contrary, restricted itself to the assertion that the Court of Appeals should have held that the higher rate was applicable. Only when the Court of Appeals denied the first petition for rehearing, did petitioner view the issue as one which the Interstate Commerce Commission alone could resolve.[4]

As this court observed in *Western Pacific*, however, the "primary jurisdiction" doctrine does not affect the existence or non-existence of jurisdiction in the conventional sense. 352 U.S. 59, 63-65. Rather it has reference solely to the allocation, as between court

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[4] It is to be noted that the decision in *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, was announced on December 3, 1956. The judgment of the district court herein was filed on February 6, 1957 (R. 28). Thus, the petitioner's principal brief on appeal and its first petition for rehearing were both filed subsequent to the *Western Pacific* decision. The second petition for rehearing, which for the first time raised the primary jurisdiction issue, was not filed until March 21, 1958 (Pet. 2), over 15 months after the *Western Pacific* decision.

and administrative tribunal, of questions which are present in a suit over which the court has jurisdiction. Petitioner's assertion that the question of the applicability of the "primary jurisdiction" doctrine may be raised as a jurisdictional issue at any time in the litigation is thus without merit. The district court had jurisdiction over the action and, if petitioner was of the view that there was occasion for application of the judicially formulated doctrine of "primary jurisdiction", it was incumbent upon it to raise that claim in the trial court.[5]

In short, no jurisdictional considerations precluded a refusal on the part of the Court of Appeals, in the sound exercise of its discretion, to permit petitioner to repudiate its consistent previous position at the remote stage of a second petition for rehearing. And, we submit, the interests of orderly judicial administration were best served by the denial of that petition. Having elected to submit the tariff construction question to the district court for decision, and having urged without qualification in defense of the appeal that the district court's determination should be affirmed, petitioner had had its day in court.

(b) In any event, there is no merit to petitioner's assertion that the tariff classification question called

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[5] Petitioner is mistaken in its assertion (Pet. 6) that in *Western Pacific* this Court *sua sponte* directed a referral to the Interstate Commerce Commission. As the opinion of the Court in that case indicates (352 U.S. at 61-62), the United States expressly requested the Court of Claims to make such a referral of the issue of reasonableness. This Court held that the issue to be referred to the Commission was of broader scope.

for Commission resolution. As this Court has long recognized, "what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute". Further, "[w]hen the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law." *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291; see also *United States* v. *Missouri-Kansas-Texas R. Co.*, 194 F. 2d 777, 778 (C.A. 5). Giving effect to this principle, this Court and other courts have on innumerable occasions undertaken to resolve, without resort to the Interstate Commerce Commission, disputes between shippers and carriers as to which of two tariff classifications governed the transportation of a particular commodity.[6]

Contrary to petitioner's seeming belief, the decision in *Western Pacific* in no way represents a departure from this established principle. Reference of the tariff classification question to the Interstate Commerce Commission there was expressly predicated on the usage of words in the tariff "in a peculiar or technical sense * * * where extrinsic evidence is neces-

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[6] See, *e.g.*, *United States* v. *Gulf Refining Co.*, 268 U.S. 542; *West Coast Products Corp.* v. *Southern Pacific Co.*, 226 F. 2d 830 (C.A. 9); *Sonken-Galamba Corp.* v. *Thompson*, 225 F. 2d 608 (C.A. 10); *Chicago B. & Q. R. Co.* v. *United States*, 221 F. 2d 811 (C.A. 7); *Atlantic Coast Line R. Co.* v. *Atlantic Bridge Co.*, 57 F. 2d 654 (C.A. 5); *American Ry. Express Co.* v. *Price Bros.*, 54 F. 2d 67 (C.A. 5).

sary to determine their meaning or proper application." 352 U.S. at 65, 66. The Court pointed to the presence of "[c]omplex and technical cost-allocation and accounting problems" and other factors "the adequate appreciation of which" presupposed an "acquaintance with many intricate facts of transportation." *Ibid.* Moreover, the Court carefully reiterated its adherence to the principle of *Great Northern R. Co.*, *supra*, p. 13, that, where construction of the tariff does not involve technical problems requiring application of agency expertise, the question is appropriate for judicial interpretation in the first instance. 352 U.S. at 65-69.

None of the considerations underlying the reference in *Western Pacific* is present here. As evidenced by the presentation in the stipulation of facts, the words of the tariff classifications involved were not used in any peculiar, technical sense beyond the competence of the court, nor does the issue presented presuppose an acquaintance with such factors as complex cost-allocation and accounting problems. Unlike the factual situation in *Western Pacific*, where the tariff did not provide a rate on non-incendiary bomb cases filled with napalm gel, the tariff under construction here certainly provided rates for different types of boxes. In our view, the Court of Appeals correctly determined that the boxes clearly fell under the classification of wooden boxes, not otherwise indexed by name. In any case the resolution of the question did not necessitate resort to the Interstate Commerce Commission under the criteria enunciated by this Court in *Western Pacific*.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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